Supreme Court, U.S.
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Case No. 91-1527

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

THE OHIO PUBLIC EMPLOYEES
DEFERRED COMPENSATION PROGRAM
Petitioner,

v.

MARVIN A. SICHERMAN, TRUSTEE
Respondent.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Pursuant to S.Ct. R. 15.6, Petitioner, The Ohio Public Employees Deferred Compensation Program, makes this reply to Respondent's brief in opposition to the granting of a writ of certiorari in these proceedings.

Respondent makes three arguments supporting his position that this Court should deny the Petition in this case. The first, summarized, is that certiorari is not called for where this Court presently has before it (in *Patterson v. Shumate,* 943 F.2d 362 (4th Cir. 1991), *cert. granted,* 60 U.S.L.W. 3498 (January 21, 1992, No. 91-913)) the same issue as had been raised in the question presented in this case. The second argument disputes the significance of the issue described in the first argument, charging that the Bankruptcy Code section presented for review (11 U.S.C. 541(c)(2)) is not applicable to the present case. The third argument asserts the Petition herein was untimely filed.

The first and second argument have in common the recognition that 11 U.S.C. 541(c)(2) is presently under review by this Court. The weight given by the Bankruptcy Code below to 11 U.S.C. 541(c)(2), and its significance both at the trial level and in the course of appellate review, has been thoroughly addressed both in the Petition for Certiorari and the Defendant's Response. Accordingly, this Reply will not add to the exchange in the record on those two points. The charge that the petition was not timely filed, however, has not been discussed before and merits a reply.

Title 28 U.S.C. Sec. 2101(c) (1982 ed.) requires that a petition for certiorari in a civil case be filed within 90 days of the entry of the judgment below. That this 90-day limit is mandatory and jurisdiction is not in dispute. *See, Missouri v. Jenkins,* 495 U.S. 33, 110 St. Ct. 1651, 1660, 109 L.Ed.2d 31 (1990). In dispute, however, is whether the pleadings presented to the Court of Appeals operated to toll the 90-day limit. Because the Court of Appeals treated the pleading as a timely-filed "petition for rehearing en banc", because it circulated the petition to the original panel and all active judges

on the court, and because it issued its mandate only after it ruled on the petition for rehearing en banc, the time allowed for filing for certiorari was tolled.

The circumstances herein are remarkably akin to those detailed in part I of *Jenkins, supra.* In that case, the petitioner (the State of Missouri) styled its filing as a "Petition for Rehearing En Banc." As this Court observed, there is technically no provisions for such a filing. "A party may petition for rehearing before the panel under Rule 40, file a suggestion for a rehearing en banc under Rule 35, or do both, separately or together." 110 S.Ct. at 1660-1661. If the filing was no more than a suggestion for rehearing en banc, the petition for certiorari would have been untimely. If its papers qualified for treatment as a petition for rehearing under Rule 40 as well as a suggestion for rehearing in banc under Rule 35, the 90-day period would not have lapsed. Of determinative importance was how the Court of Appeals treated the pleading, not its given title:

> It appears to us that the Court of Appeals interpreted and actually treated the State's papers as included in a petition for rehearing before the panel. If the Eighth Circuit had regarded the State's papers as only a suggestion for rehearing in banc, without a petition for a panel rehearing as well, Rules 35(c) and 41(a) of the Federal Rules of Appellate Procedure would have required the court to issue its mandate within 21 days of the entry of the panel's judgment. The Court of Appeals did not issue the mandate within 21 days of the panel's judgment but issued it only upon its October 14 order denying the State's petition. Nor did the Court of Appeals issue an order extending the time for the issuance of the mandate, as it may do under Rule 41(a). 110 S.Ct. at 1661.

The circumstances herein are similar: the Court of Appeals regarded the pleading in question as a petition for panel rehearing, as is shown in the Order itself, which begins:

> The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel. [Order, *In re: Walter Leadbetter,* No. 91-3076 (6th Cir., December 19, 1991) (pages A-3 and A-4, Appendix to Petition for Writ of Certiorari)]

The above quoted order was filed December 19, 1991, following the October 21, 1991 order of the panel. No mandate was issued by the Court of Appeals until December 30, 1991. As was noted in *Jenkins,* the Court of Appeals would be required under Rule 41(a) to issue its mandate "21 days after the entry of judgment unless the time is shortened or enlarged by order." 110 S.Ct. at 1661, footnote 17. Having issued no mandate after the opinion was issued on October 21, 1991, and having in fact waited until after its review of the petition for rehearing en banc to issue its mandate, the Court of Appeals acted in a manner wholly consistent with that of the Eighth Circuit in *Jenkins.*

This Court in *Jenkins* has recognized the difficulty of these questions, and in its resolution has turned to the manner in which the Court of Appeals has treated the pleadings presented for en banc review. From the record below, the Sixth Circuit unambiguously treated the pleading as one containing a suggestion for rehearing in banc, but also including a petition for panel rehearing. Accordingly, as in *Jenkins,* the time in which a certiorari petition could be properly filed with this Court was extended to commence on December 19, 1991 when the Court of Appeals issued its Order denying the petition for rehearing en banc.

That being the case, Respondent's argument to the contrary is without merit and should be rejected.

Respectfully submitted,

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